No. 05-1240

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER ANDRE WALLACE

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QUESTION PRESENTED

When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

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OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-18) and the opinion of Judge Posner dissenting from the denial of rehearing en banc (Pet.App. 19-28) are reported at 440 F.3d 421. The opinions of the district court (Pet.App. 30-36, 37-52) are not officially reported.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on March 22, 2006. The Court granted the petition on June 19, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioner filed this action under 42 U.S.C. §1983 seeking damages for the eight years he was incarcerated following his arrest in 1994. The core of petitioner's claim is that he was arrested without probable cause and held in custody for eight years because respondents, Chicago police officers, exploited the unlawful arrest to obtain a false confession which was the basis for petitioner's conviction.

Petitioner filed this damage action in 2003 after his conviction had been reversed and criminal charges dismissed. The district court granted summary judgment to respondents, and the court of appeals affirmed, concluding that petitioner's cause of action had accrued when he was arrested in 1994 and was therefore barred by the statute of limitations. Petitioner's claim would be timely if his cause of action accrued when the criminal charges were dismissed in 2002.

1. Arrest and Confession

On January 17, 1994, a man named John Handy was shot and killed in Chicago. (Pet.App. 2.) Two days later, Chicago police officers Roy and Kato, respondents in this Court, came upon petitioner on the street near the scene of the murder. (J.A. 7.) Respondents handcuffed petitioner and and transported him to a police station.[1] (J.A. 9.) Petitioner was only 15 years

1. Petitioner sets out the facts and reasonable inferences in his favor because this case arises from the grant of a motion for summary judgment to respondents. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

of age. (Pet.App. 3.)

Respondents locked petitioner into an "interview room" at the police station. (J.A. 8.) There, petitioner told respondents that he was seventeen years of age, that he was not involved in the Handy homicide, and that he had an alibi. (Sworn Declaration of Andre Wallace, Exhibit 1 to Record Item No. 31, par. 5.)

Throughout the night, respondents interrogated petitioner by playing "good cop/bad cop." (Pet.App. 3.) As the "bad cop," Kato slapped petitioner on his face, (Sworn Declaration, *supra*, par. 14(i)), kicked petitioner on his knee, (Sworn Declaration, *supra*, par. 14(ii)), and squeezed petitioner's testicles. *Id.*

Kato would walk in and out of the interview room during the interrogation and be replaced by respondent Roy, who would plead with petitioner "to confess so that he could stop Kato from hurting me." (Sworn Declaration, *supra*, par. 14(viii).) Roy would leave when Kato returned; Kato would then "yell, threaten, and curse." (Sworn Declaration, *supra*, par. 14(ix).) One of these threats was that if petitioner did not confess to involvement in the Handy homicide, Kato "was going to talk to me with his hands," which petitioner understood to mean that Kato "was going to beat me unless I made a false confession." (Sworn Declaration, *supra*, par. 14(iv).)

The interrogation continued through the night. (Sworn Declaration, *supra*, par. 14(x).) Respondents kept petitioner awake, and did not allow him to use the bathroom. (Sworn Declaration, *supra*, par. 14(xi).) After Kato promised petitioner that he could go home if he confessed (Sworn Declaration, *supra*, par. 14(iv)),

petitioner yielded to the coercive tactics and signed a written incriminatory statement. (J.A. 11.) This confession was false. (Sworn Declaration, *supra*, pars. 7, 14, 14(iv), 14(vii), 14(xii).) Petitioner did not shoot Mr. Handy, (Sworn Declaration, *supra*, par. 11), was not present when Handy was shot, (Sworn Declaration, *supra*, par. 12), and does not know who shot Handy. (Sworn Declaration, *supra*, par. 13.)

Based on the confession, and with no other evidence to corroborate his involvement in the homicide, petitioner was charged with murder and prosecuted as an adult.[2]

2. State Court Proceedings

The state trial judge denied motions challenging the arrest and seeking to suppress petitioner's confession. (J.A. 11.) Petitioner did not present any evidence at a bench trial and was found guilty of murder. (J.A. 14-15.) On direct appeal, the Illinois Appellate Court concluded that plaintiff had been unlawfully arrested, (J.A. 15-19), and remanded the case for an attenuation hearing. *People v. Wallace*, 299 Ill.App.3d 9, 701 N.E.2d 87 (1998) (J.A. 6-23.)

The trial judge reinstated petitioner's conviction on remand, but the Illinois Appellate Court reversed in an unpublished opinion, *People v. Wallace*, 299 Ill.App.3d

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2. A percipient witness who had been "face-to-face" with Handy's assailant, (J.A. 7), did not identify petitioner. (J.A. 10.)

9, 701 N.E.2d 87 (1998), (J.A. 24-35), holding that the confession was the tainted fruit of the unlawful arrest, (J.A. 34), and remanded for a new trial. Review was denied by the Illinois Supreme Court, *People v. Wallace*, 197 Ill.2d 582, 763 N.E.2d 776 (2001) (table). The prosecutor dismissed all charges against petitioner on April 10, 2002. (Pet.App. 4.)

3. Federal Court Proceedings

Petitioner filed this action on April 3, 2003, less than one year after his release, raising several state and federal claims. The district court granted summary judgment to respondents on many of petitioner's claims, (Pet.App. 30-37), and permitted petitioner to file an amended complaint. (J.A. 2.)

Petitioner alleged in his amended complaint that he had been deprived of rights secured by the Fourth and Fourteenth Amendments when he was arrested in 1994 and when testimony about his post-arrest inculpatory statement was used against him at trial. (Record Item No. 25.) The district court granted summary judgment to respondents on these claims. (Pet.App. 38-51.)

A panel of the Seventh Circuit affirmed, holding that petitioner's claims about his arrest and subsequent confession were time barred. (Pet.App. 18.) The panel invoked a circuit rule that permits a panel to reverse a prior decision of the court of appeals by circulating its proposed decision to all active members of the court and inviting a vote on rehearing en banc. (Pet.App. 2 n*.) Using this rule, the panel overruled two of the Seventh Circuit's recent decisions, *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004), and

adopted a bright line rule that all claims "for false arrest or similar Fourth Amendment violations" accrue at the time of arrest. (Pet.App. 13.) The court of appeals believed its rule was "an arguable extension" of *Heck v. Humphrey*, 512 U.S. 477 (1994), (Pet.App. 12), justified because "a clear accrual rule is superior to a case-by-case rule." (Pet.App. 14.)

Judge Posner wrote a lengthy dissent from the refusal of the court of appeals to re-hear the case en banc, (Pet.App. 19-28), pointing out that the bright line rule adopted by the panel was at odds with *Heck v. Humphrey, supra*, because "a civil rights suit is not a permissible vehicle for a collateral attack on a conviction." (Pet.App. 19.) Judge Posner noted that the panel decision departed from "[e]very other case to address the issue," (Pet.App. 19), and described the panel's rule as "flouting conventional statute of limitations principles," (Pet.App. 27), because it requires a §1983 plaintiff "to sue before you have a claim." (Pet.App. 21.)

SUMMARY OF ARGUMENT

It is by now a "familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *New York v. Harris*, 495 U.S. 14, 19 (1990). This rule was applied by the Illinois Appellate Court when it twice reversed petitioner's criminal conviction. Petitioner remained in custody from his arrest on January 19, 1994 until April 10, 2002, when the prosecution, all of its evidence having been suppressed, dismissed the criminal case.

After he was released from custody, petitioner filed this action under 42 U.S.C. §1983, seeking money damages from the officers who had exploited the unlawful arrest to obtain a false confession. The Seventh Circuit held that petitioner's claims were barred by the statute of limitations, concluding that the only §1983 claim which arises from an arrest without probable cause accrues at the time of arrest.

The Seventh Circuit's reading of petitioner's claims is at odds with the plain language of the Fourth Amendment and disregards accepted and ordinary principles of causation: petitioner was subjected to an unreasonable seizure for the eight years that he was held in custody on the tainted fruit of the unlawful arrest; being held in custody was the natural consequence of respondents' actions to exploit the false arrest to secure a confession.

The Court established the appropriate rule of accrual for the claim presented in this case in *Heck v. Humphrey*, 512 U.S. 477 (1994), when it held that a §1983 claim seeking to recover "damages for [an] allegedly unconstitutional conviction or imprisonment" does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

The Seventh Circuit's accrual rule is an unwarranted "extension" of the *Heck* rule and is based on the Seventh Circuit's view that §1983 does not provide a remedy "for the 'injury' of being convicted and

imprisoned," *Heck v. Humphrey*, 512 U.S. at 487 n.7, when, as here, a conviction rests on the tainted fruit of an unlawful arrest, that conviction has been overturned on direct appeal, and the §1983 claimant is released from incarceration. (Pet.App. 16-17.) The Seventh Circuit stands alone on these issues and its decision should be reversed.

The rule of accrual advocated by petitioner is consistent with the accrual of a common law action for false imprisonment; the "almost universal rule" is that a claim for false imprisonment accrues on the termination of the imprisonment. Petitioner's rule of accrual is also consistent with the rule adopted by the Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) for accrual of a claim for future damages that may result from an antitrust conspiracy. Finally, petitioner's rule of accrual is also consistent with the rule followed in the majority of the states for accrual of attorney malpractice cases that arise from criminal prosecutions.

The Seventh Circuit stands apart from all other circuits with its view that all false arrest claims accrue at the time of arrest. The Seventh Circuit's rule, if allowed to stand, will result in the needless filing of innumerable false arrest claims, filings necessary to preserve the claims in the event that a conviction is eventually overturned.

The Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, a cause of action for the injury of being convicted and

imprisoned accrues when the criminal charges are resolved in favor of the arrestee.

ARGUMENT

1. Introduction

Respondents, Chicago police officers Cato and Roy, arrested petitioner on January 19, 1994. The officers did not have a reasonable belief that petitioner had committed an offense, and the arrest was an "unreasonable seizure" proscribed by the Fourth Amendment.[3]

Respondents exploited the unlawful arrest to obtain a confession from petitioner: Respondents took the then 15 year old petitioner into custody at about 8:00 p.m. on January 19, 1994 and transported him to a police station. (J.A. 25.) There, instead of providing petitioner with the judicial determination of probable cause required by the Fourth Amendment,[4] respondents misused the warrantless seizure to gather "additional evidence to justify the arrest." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Respondents

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3. The Fourth Amendment's protection against "unreasonable . . . seizures" includes seizure of the person. *Henry v. United States*, 361 U.S. 98, 100 (1959); *Dunaway v. New York*, 442 U.S. 200 (1979); *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

4. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment required that persons arrested without a warrant must receive a post-arrest judicial determination of probable cause.

locked petitioner into an interview room and used "good cop/bad cop" tactics during the all-night interrogation.[5] See *ante* at 4-5. Petitioner made an incriminating oral statement at 4:30 a.m. the next morning, (J.A. 17), and a full, albeit false, confession shortly thereafter, at 6:45 a.m. (J.A. 10.)

Petitioner was incarcerated for more than eight years—from his arrest on January 19, 1994 until he was released from custody on April 10, 2002—because the prosecution relied on a false and unconstitutionally procured confession to obtain an indictment and a conviction. The state appellate court twice reversed petitioner's conviction, holding in the first appeal that petitioner had been unlawfully arrested (J.A. 17-18), and concluding in a second appeal that petitioner's confession was inadmissible because it had been obtained by exploiting the unlawful arrest. (J.A. 34.) Having no admissible evidence, the prosecution dismissed the case.

Since *Monroe v. Pape*, 365 U.S. 167 (1961), it has been settled that 42 U.S.C. §1983 provides a damage

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5. The state trial judge denied petitioner's motion to suppress on voluntariness grounds; petitioner did not challenge this ruling on direct appeal. The district court held that collateral estoppel prohibited petitioner from challenging the voluntariness of the confession. (Pet.App. 43-49.) The court of appeals did not reach this issue. (Pet.App. 18.) The voluntariness of the confession is not before the Court.

remedy for a person who has been subjected to an unreasonable seizure in violation of the Fourth Amendment.[6] The question in this case is whether petitioner's cause of action for the unreasonable seizure accrued when he was arrested in 1994, or when he was released from custody in 2002: Petitioner's §1983 claim is barred by the statute of limitations if his claim accrued in 1994, but timely if the claim accrued in 2002.[7]

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6. The Court held in *Wolf v. Colorado*, 338 U.S. 25 (1949), that the protections of the Fourth Amendment are "implicit in 'the conception of ordered liberty' and as such [are] enforceable against the States through the Due Process Clause." *Id.* at 38. The Court held in *Monroe v. Pape, supra*, that 42 U.S.C. §1983 provides a remedy for violations of the Fourth Amendment against persons who had acted under "color of state law." *Id.* at 187.

7. While federal law determines when a §1983 cause of action accrues, *Heck v. Humphrey*, 512 U.S. 477, 489 (1994), the duration of the statute of limitations for §1983 claims is borrowed from the state's general statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Section 1983 claims arising in Illinois are therefore governed by a two year statute of limitations. *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001).

Tolling of the statute of limitations is determined by state law. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). In Illinois, the statute of limitations on a claim accruing to a person under the age of 18 is tolled until he (or she) attains that age. 735 ILCS 5/13-211. Petitioner became eighteen years of age on November 7,

2. The Rule of Accrual of Heck v. Humphrey and a Cause of Action for the "Injury" of Being Convicted

The Court established a rule of accrual for §1983 actions in *Heck v. Humphrey*, 512 U.S. 477 (1994), holding that a §1983 claim seeking to recover "damages for [an] allegedly unconstitutional conviction or imprisonment" does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. The Court held that this accrual rule would apply to any §1983 action where success for the claimant "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

The Seventh Circuit held in this case that a successful §1983 action arising out of a false arrest, when the fruits of the arrest had been introduced in the claimant's criminal trial to secure a conviction, can never imply the invalidity of a conviction. (Pet.App. 13.) This holding is compelled by the mistaken view of the court below that §1983 does not provide a remedy "for the 'injury' of being convicted and

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1997. If petitioner's cause of action accrued when he was arrested in 1994, the statute of limitations would have expired on Monday, November 8, 1999, nearly two years before the Illinois Appellate Court reversed petitioner's conviction.

imprisoned," *Heck v. Humphrey*, 512 U.S. at 487 n.7, even when, as in this case, a conviction rests on the tainted fruit of an arrest without probable cause, that conviction has been overturned on direct appeal, and the §1983 claimant is then released from incarceration. (Pet.App. 16-17.) The Seventh Circuit stands alone on these issues and its decision should be reversed.

A. Success on Petitioner's False Arrest Claim Before Dismissal of the Criminal Charges Would Have Necessarily Implied the Invalidity of Any Conviction

All of the evidence available to the prosecution at petitioner's trial was the fruit of his arrest. Before the decision of the Seventh Circuit in this case, the courts of appeals were in agreement that *Heck v. Humphrey* barred petitioner's false arrest claim until his conviction was invalidated because "all the evidence to be presented was obtained as the result of an illegal arrest." *Laurino v. Tate* 220 F.3d 1213, 1217 n.3 (10th Cir. 2000). The universal reading of *Heck* was that cases "where the only evidence supporting the conviction is tainted by a possible constitutional violation that is the subject of a §1983 action—are perhaps the quintessential example of when the *Heck* deferred accrual rule is triggered." *Gibson v. Superintendent of New Jersey Dept. of Law*, 411 F.3d 427, 452 (3d Cir. 2005).

The Seventh Circuit, in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), a decision overruled in this case, explained this rule as follows:

> It might be argued that [the civil rights plaintiff] could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a

conclusion would be consistent with *Heck*. For he could not knock out the arrest without also (by virtue of *Wong Sun*) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional, until he gets the conviction thrown out.

Gauger v. Hendle, 349 F.3d at 362.

Decisions in other circuits are in accord.[8]

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8. First Circuit: *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (Fourth Amendment claim involving a "continuing seizure" during the criminal prosecution does not accrue until acquittal).

Second Circuit: *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) ("in a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence").

Fourth Circuit: *Ballenger v. Owens*, 352 F.3d 842, 846-47 (4th Cir. 2003) ("If Ballenger succeeds in demonstrating in this §1983 case that his traffic stop was illegal, the illegality of the search would require the suppression of the evidence seized . . . Because a judgment for Ballenger in this case would necessarily imply invalidity of his conviction, the case at this stage amounts to no more than an unexhausted habeas corpus claim that collaterally attacks his conviction.").

Fifth Circuit: *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (challenge to arrest barred by *Heck* because

if the "arresting officers lacked probable cause to arrest Hudson for burglary and the arrest is invalid, the firearm discovered in Hudson's possession as a result of the arrest would be subject to suppression under the Fourth Amendment as the "fruit" of an illegal arrest.").

Sixth Circuit: *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 398-99 (6th Cir. 1999) ("Since it appears that the only evidence that was to be introduced against Shamaeizadeh was evidence discovered in Shamaeizadeh's house during the allegedly illegal search, it would not have been possible, while the criminal proceedings against Shamaeizadeh were pending, to determine whether a decision on Shamaeizadeh's claim would imply the invalidity of his potential conviction without deciding issues common to the criminal action—i.e., whether the search was lawful.").

Eighth Circuit: *Anderson v. Franklin County*, 192 F.3d 1125, 1131 (8th Cir. 1999) (because conviction had not been invalidated, "claims of false arrest and imprisonment should be dismissed without prejudice").

Ninth Circuit: *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 1998) ("a §1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned").

Eleventh Circuit: *Uboh v. Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998) ("[W]here a section 1983 plaintiff is seized following the institution of a prosecution . . . he can properly wait until the prosecution terminates in his favor to bring his section 1983 claim which alleges that the seizure was unreasonable.") (quoting *Whiting v.*

Before the decision of the Seventh Circuit in this case, there was also universal agreement that *Heck* required a district judge to make a fact specific inquiry and "look both to the claims raised under §1983 and to the specific offenses for which the §1983 claimant was convicted." *Hughes v. Lott*, 350 F.3d 1157, 1161 n.2 (11th Cir. 2003). The Seventh Circuit refused to make any fact specific inquiry in this case (Pet.App. 13), relying on its view that the only "injury" that can result from a false arrest occurs when the arrest is made. (Pet.App. 12.) This view is based on an overly narrow view of the protections of the Fourth Amendment and disregards accepted and ordinary principles of causation.

B. Incarceration on the Basis of a Confession Obtained by Exploiting a False Arrest Is a "Continuing Seizure" in Violation of the Fourth Amendment

The Seventh Circuit's holding that the only "injury" which can result from a false arrest occurs at the instant the arrest is made (Pet.App. 12) is based on the view of that court that "the fourth amendment drops out of the picture following a person's initial appearance in court." *Hernandez v. Sheahan*, 455 F.3d 772, ___ (7th Cir., No. 04-2246, July 26, 2006) (slip op. 8.) The Seventh Circuit has consistently held that the Fourth Amendment seizure associated with an arrest ends long before the tainted fruits of the arrest are used to hold the arrestee in custody. *Reed v. City of*

Traylor, 85 F.3d 581, 585-86 (11th cir. 1996)).

Chicago, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *McCullah v. Gadert*, 344 F.3d 655, 661 (7th Cir. 2003). The Seventh Circuit's view of the scope of the Fourth Amendment is at odds with the decision of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994).

Before the decision of this Court in *Albright*, the Seventh Circuit viewed all §1983 claims concerning post-arrest events as sounding in "substantive due process." The Court of Appeals announced this rule in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), holding that "once an arrested person is charged but before he is convicted, the question whether the fact, manner, or duration of his continued confinement is unconstitutional passes over from the Fourth Amendment to the due process clause." *Id.* at 193. In choosing to adopt this "substantive due process" standard, the Seventh Circuit rejected "the concept of a continuing seizure" under the Fourth Amendment. *Id.* at 193.

This Court overruled the Seventh Circuit's "substantive due process" approach in *Albright v. Oliver*, 510 U.S. 266 (1994). Although *Albright* was decided without a majority opinion, all members of the Court agreed that Albright's claim of post-arrest restraints should be viewed as a Fourth Amendment violation.

In an opinion joined by three other members of the Court, Chief Justice Rehnquist noted that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it," *id.* at 274, but did not express any view of whether the petitioner's claim was viable under the Fourth Amendment. *Id.* at 275.

Justice Ginsburg, who joined in the plurality opinion, wrote separately to express her view that an arrestee continued to be "seized" under the Fourth Amendment during the pendency of a criminal prosecution, even when released on bail. 510 U.S. at 280. On this view, "[t]he time to file the §1983 action [challenging the arrest] should begin to run . . . upon dismissal of the criminal charges." *Id.*

Justice Kennedy, joined by Justice Thomas, concurred in the judgment, and agreed that the petitioner's "allegation of arrest without probable cause must be analyzed under the Fourth Amendment." 510 U.S. at 281.

Justice Souter, who also concurred in the judgment, wrote separately and noted that the injuries claimed by the petitioner had been held to be "cognizable in §1983 claims founded upon arrests that are bad under the Fourth Amendment."[9] 510 U.S. at 290. Justice Stevens, joined by Justice Blackmun, dissented from the Court's rejection of the substantive due process

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9. The petitioner in *Albright* claimed damages for "limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond; financial expense of his legal defense; reputational harm among members of the community; inability to transact business or obtain employment in his local area, necessitating relocation to St. Louis; inability to secure credit; and personal pain and suffering." 510 U.S. at 289 (Souter, J., concurring).

argument, and noted agreement with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable." *Id.* at 307.

In its post-*Albright* decisions, the Seventh Circuit has continued to reject the "continuing seizure" rationale, adhering to its pre-*Albright* view that a person stops being "seized" when he (or she) has received a *Gerstein* hearing or been arraigned.[10] *See, e.g., Garcia v. City of Chicago*, 24 F.3d 966, 971 n.6 (7th Cir. 1994) ("the seizure of a person ends after the *Gerstein* hearing); *Lee v. City of Chicago*, 330 F.3d 456, 463 (7th Cir. 2003) (Fourth Amendment inapplicable "when a suspect was already lawfully in custody"); *Gauger v. Hendle*, 349 F.3d 354, 362-63 (7th Cir. 2003) (damages for arrest without probable cause end at filing of formal charges); *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004) (damages for arrest without probable cause end at arraignment).

Judge Posner, the author of the Seventh Circuit's pre-*Albright* rejection of the continuing seizure

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10. The Seventh Circuit explicated its view of *Albright* in *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), concluding that the "effective holding" of *Albright* is "that satisfying the elements of the state-law tort of malicious prosecution . . . *knocks out* any constitutional tort of malicious prosecution." (emphasis in original)

rationale, *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), suggested in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) that the court of appeals should revisit its rejection of the continuing seizure approach, noting that the rules applied by the Seventh Circuit would cause the "shocking" result that "a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is." *Id.* at 360. The Seventh Circuit rejected this suggestion in its decision in this case. (Pet.App. 16-17.)

The Seventh Circuit stands alone in its view that "the fourth amendment drops out of the picture following a person's initial appearance in court." The Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have applied the Fourth Amendment to events that occurred after the initial court appearance.[11]

The petitioner in this case was incarcerated for more than eight years because respondents exploited his unlawful arrest to obtain a confession. Petitioner

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11. *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000); *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005); *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir. 1997); *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000) *Gregory v. City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006); *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996).

was "seized" while incarcerated; nothing that occurred at his initial appearance before a judge, at his arraignment, or at his trial relieved him of the restraints of incarceration. Petitioner remained "seized" from his arrest on January 19, 1994 until he was released from custody on April 10, 2002, after the criminal case had been dismissed.

After the criminal charges against petitioner were dismissed, the entirety of his eight years of incarceration is properly viewed as an unreasonable "continuing seizure" that contravened the Fourth Amendment.[12] When petitioner's Fourth Amendment claim is viewed in this manner, "[t]he time to file the §1983 action should begin to run not at the start but at the end of the episode in suit, i.e., upon dismissal of the criminal charges." *Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J. concurring). The same result would be obtained if accrual of petitioner's Fourth Amendment claim of unconstitutional imprisonment is judged by the standards applicable to a common law action for

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12. *See, e.g., Gallo v. City of Philadelphia*, 161 F.3d 217 222-25 (3d Cir. 1998) (conditions of pre-trial release of criminal defendant were a seizure); *Gregory v. City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006) ("continued detention without probable cause is an actionable Fourth Amendment injury under §1983"); *Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996) (Fourth Amendment includes "right to be free from an unlawful seizure which is part of a prosecution.").

false arrest and false imprisonment.

3. Lessons from the Common Law

The Court, in construing §1983, has often considered "the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith v. Wade*, 461 U.S. 30, 33 (1983). While common law rules may provide an "appropriate starting point," they are not necessarily the "complete solution." *Carey v. Piphus*, 435 U.S. 247, 258 (1978). The common law tort actions for false arrest or false imprisonment serve as an "inspired example," *Hartman v. Moore*, 126 S.Ct. 1695, 1702 (2006), for petitioner's position that a person who is held in custody pending the final adjudication of criminal charges remains "seized" under the Fourth Amendment. The common law rules about the type of damages that could be proximately caused by a malicious prosecution provide an alternative to recognizing a Fourth Amendment violation that continued throughout the eight years that petitioners was incarcerated.

A. False Arrest and False Imprisonment

"False arrest" is "a popular and convenient expression to indicate that an arrest was not lawful and, therefore, whatever harm has been done to the plaintiff not privileged." F. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Tex. L. Rev. 157, 162 (1937). "[A] person who is falsely arrested is at the same time falsely imprisoned." *Whirl v. Kern*, 407 F.2d 781, 790 (5th Cir. 1969).

"To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the

person; and, 2. The unlawfulness of such detention."[13] 3 W. Blackstone, *Commentaries on the Laws of England* 127 (1769). The civil remedy for this tort is "an action of trespass, *vi et armis*, usually called an action of false imprisonment." *Id.* at 138.

The "almost universal rule" is that a claim for false imprisonment accrues on the termination of the imprisonment.[14] *Collins v. Los Angeles County*, 241 Cal.App.2d 451, 455, 50 Cal.Rptr. 586, 588 (1966). There, in deciding a question of first impression under California law, the state appellate court canvassed decisions from other jurisdictions and agreed with M.C. Dransfield, Annotation, "When statute of limitations begins to run against action for false imprisonment or false arrest," 49 A.L.R. 2d 922 (1956), that a cause of

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13. See, e.g., *Caperton v. Bowyer*, 81 U.S. 216, 231 (1871) (Plaintiff "alleged that the defendant, on the twenty-ninth of June, 1862, with force and arms, seized the plaintiff and incarcerated him in a dungeon, and imprisoned him there for twenty-four days, separated from his home and family, and that he subjected him to great danger and many hardships, and seriously impaired his health and put him to great pain and distress, both of body and mind.").

14. Cases from jurisdictions which do not follow this rule include *City of Mound Bayou v. Johnson*, 562 So.2d 1212, 1216-1217 (Miss. 1990) (false arrest claim accrues on date of arrest); *Bauer v. Borough of Cliffside Park*, 225 N.J.Super. 38, 47, 541 A.2d 719, 723 (1988) (same).

action for false imprisonment accrues on "the termination of imprisonment." 241 Cal.App.2d at 456, 50 Cal.Rptr. at 589. This rule was applied before the enactment of §1983 and can be fairly said to be "almost universal." 241 Ca.App.2d at 455, 50 Cal.Rptr. at 588.[15]

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15. In *Huggins v. Toller*, 64 Ky (1 Bush) 192, 1867 WL 3888 (1867), the Court of Appeals of Kentucky held that a one-year statute of limitations had not run because "if, as charged, the appellee at first caused the arrest and imprisonment, he was liable for each day such imprisonment was continued, and the statute did not bar the action as to the injury sustained within one year next before the action was commenced." 1867 WL 3888 *3;

See also Kirwan v. State, 31 Conn.Supp. 46, 320 A.2d 837 (1974); *Stanford v. City of Manchester*, 246 Ga.App.129, 539 S.E.2d 845 (2000); *Matovina v. Hult*, 125 Ind.App. 236, 245-46, 123 N.E.2d 893, 898 (1955); *Heron v. Strader*, 361 Md. 258, 761 A.2d 56, 62 (2000) (collecting cases); *Jedzierowski v. Jordan*, 157 Me 352, 172 A.2d 636 (1961); *Nawrocki v. Eberhard Foods, Inc.*, 24 Mich.App. 646, 649, 180 N.W.2d 849, 851 (1970); *Stafford v. Muster*, 582 S.W.2d 670, 680 (Mo. 1979); *Mobley v. Broome*, 248 N.C. 54, 56, 102 S.E.2d 407, 409 (1958), *overruled on unrelated grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993); *O'Fallon v. Pollard*, 427 N.W.2d 809, 811 (N.D. 1988); *Jackson v. Police Dept. of City of New York*, 500 N.Y.S.2d 553 (N.Y.A.D. 1986); *Belflower v. Blackshere*, 281 P.2d 423 (Okla. 1955); *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153 (Tex.Civ.App. 1980); *Nave v. City of Seattle*, 68 Wash.2d 721, 723, 415 P.2d 93, 94-95 (1966); *Oosterwyk v. Bucholtz*, 250 Wis. 521, 524, 27 N.W.2d 361, 362 (1947).

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court cited a treatise for the proposition that damages for a false arrest claim "cover the time of detention up until issuance of process or arraignment, but not more." *Id.* at 484, quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 888 (5th ed. 1984). The treatise does not cite any authority to support this proposition, which, while stated in *Allen v. Shed*, 10 Cush (64 Mass.) 375 (1852), appears to reflect a minority view, rather than the "almost universal rule" discussed above, which would allow recovery of damages for post-arraignment imprisonment. See also *Simanton v. Caldbeck*, 96 Vt. 523, 525, 121 A. 411, 412 (1923) (allowing damages for defense of underlying prosecution in false imprisonment action); *Bonesteel v. Bonesteel*, 30 Wis. 511, 1872 WL 3125 *3 (1872) (allowing damages in false imprisonment action for "counsel fee and expenses in procuring his discharge from arrest").

The common law tort of false imprisonment presents a fair analogy to a §1983 action against a police officer who makes a warrantless arrest without probable cause. The gist of each cause of action is unlawful detention; the §1983 action has the additional element that the wrongdoer act under color of law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In each cause of action, the "background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), would allow the wrongfully arrested person who was imprisoned for eight years because police officers exploited the unlawful arrest to obtain a confession to file suit upon obtaining his (or her) liberty

and recover damages for the entire period of incarceration. The same result is obtained if petitioner's cause of action is compared to the common law tort of malicious prosecution.

B. Malicious Prosecution

Section 1983 cases seeking damages attributable to an unconstitutional conviction or sentence are often analogized to the common law action of "malicious prosecution." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). This approach is followed by eight circuits.[16]

The focus of the common law tort is on "the improper instigation of a criminal proceeding." 1 F. Harper, F. James, & O. Gray, *The Law of Torts* §4.3 at 6 (2d ed 1986) While this focus may not be helpful in analyzing a §1983 action for damages attributable to an unconstitutional conviction, *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J. concurring), other aspects of the common law tort would allow a

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16. See, e.g., *Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003), opinion following remand, 430 F.3d 140 (3d Cir. 2005); *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000); *Thacker v. City of Columbus*, 328 F.3d 244, 258 (6th Cir. 2003); *Moran v. Clarke*, 296 F.3d 638, 646 (8th Cir. 2002); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004); *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003).

meaningful §1983 remedy even if the Court did not agree that petitioner was seized within the meaning of the Fourth Amendment for the eight years that he was incarcerated. *Cf. Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir. 2004) ("at some point after arrest, and certainly by the time of trial, constitutional analysis shifts [from the Fourth Amendment] to the Due Process Clause").

The damages that may be obtained in a common law malicious prosecution action are those which were proximately caused by the prosecution. Such damages may include "compensation for loss of time, loss of income, loss of credit, emotional distress, and harm to reputation generally, as well as expenditures made in defending the malicious prosecution." 1 F. Harper, F. James, & O. Gray, *The Law of Torts* §4.7 at 57-58 (2d ed 1986) (citations omitted). These are the type of losses which petitioner incurred during the eight years he was held in custody. The proximate cause of petitioner's imprisonment was respondents' actions to exploit petitioner's unlawful arrest to secure a false confession. It is settled law that such actions contravene the Fourth Amendment. *New York v. Harris*, 495 U.S. 14, 19 (1990).

Section 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), and, "[l]ike other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties." *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring). Thus, the police officers who exploited petitioner's unlawful arrest should be responsible for the "natural consequences of [their] actions."

Monroe v. Pape, 365 U.S. 167, 187 (1961).

Another aspect of the common law tort of malicious prosecution is relevant to petitioner's claim: A cause of action for common law malicious prosecution does not accrue until there has been a favorable termination of the criminal proceeding; this, of course, is the accrual rule that the Court adopted in *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

The common law action of malicious prosecution supports petitioner's position that his damage claim did not accrue until the criminal charges had been resolved in his favor. Also supporting petitioner is the accrual rule applied when an antitrust injury results in future damages whose "accrual is speculative or their amount and nature unprovable." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

4. The Hazeltine Rule

The accrual question presented in this case is similar to that answered by the Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). There, starting from the general rule that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business," the Court held that when the antitrust injury arises from a continuing conspiracy, a cause of action accrues "each time a plaintiff is injured by an act of the defendants." *Id.* at 338.

After noting that the cause of action accruing from a continuing conspiracy permits the plaintiff to "recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date," 401 U.S. at 339,

the Court turned to the situation where an antitrust injury results in future damages whose "accrual is speculative or their amount and nature unprovable." The Court held that this cause of action "will accrue only on the date they are suffered." *Id.*

The policies which support the *Hazeltine* rule are similar to those underlying §1983. Private antitrust actions serve "as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Section 1983 actions are "an effective deterrent" to police wrongdoing. *Hudson v. Michigan*, 126 S.Ct. 2159, 2167-68 (2006). The antitrust laws are intended to "protect the victims of the forbidden practices." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). Section 1983 is intended "to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972). The Court relied on these policies when it formulated the *Hazeltine* rule, lest "future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery." *Hazeltine*, 401 U.S. at 340.

As applied to this case, *Hazeltine* compels the result that petitioner's claim is not barred by the statute of limitations. Petitioner did not have any damage claim for "the 'injury' of being convicted and imprisoned (until his conviction [was] overturned)." *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994). This injury was incurred on the day that the criminal charges were dismissed. Petitioner filed this action within the two year statute of limitations that applies to §1983 claims in Illinois, see *ante* at 12 n.7, and

respondents' statute of limitations defense should have been overruled.

5. The Rule of Accrual Applied in Attorney Malpractice Cases

The accrual question presented in this case is also similar to that presented in attorney malpractice suits against criminal defense attorneys

The general rule is that a claim of legal malpractice in a criminal case does not accrue "until relief from a conviction is achieved." *Trobaugh v. Sondag*, 668 N.W.2d 577, 583-84 (Iowa 2003). This rule is often referred to as the "exoneration rule," *Canaan v. Bartee*, 276 Kan. 116, 120-31, 72 P.3d 911, 915-21 (2003), and is followed in the majority of jurisdictions which have considered the question.[17] *Robinson v.*

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17. Cases adopting this rule of accrual include: Alaska: *Shaw v. State, Department of Admin.*, 816 P.2d 1358, 1360 (Alaska 1991); Arizona: *Glaze v. Larsen*, 207 Ariz. 26, 32, 83 P.3d 26, 32 (2004); California: *Wiley v. County of San Diego*, 19 Cal.4th 532, 79 Cal.Rptr.2d 672 (1998); Florida: *Cira v. Dillinger*, 903 So.2d 367, 370 (Fla.App. 2005); Illinois: *Paulsen v. Cochran*, 356 Ill.App.3d 354, 358-59, 826 N.E.2d 526, 530 (2005); Kentucky: *Stephens v. Denison*, 150 S.W.3d 80 (Ky.App. 2004); Maryland: *Berringer v. Steele*, 133 Md.App. 442, 484, 758 A.2d 574, 597 (2000); Massachusetts: *Glenn v. Aiken*, 409 Mass. 699, 707-08, 569 N.E.2d 783, 788 (1991); Minnesota: *Noske v. Friedberg*, 656 N.W.2d 409, 413 (Minn.App. 2003); Nevada: *Morgano v. Smith*, 110 Nev. 1025, 1028-29, 879 P.2d 735, 737 (1994); New Hampshire: *Thierrien v. Sullivan*, 891 A.2d 560, 562 (N.H. 2006) (must show

Southerland, 123 P.3d 35, 43 (Okla Civ.App. 2005).

"[A] rule that encouraged the early filing of malpractice suits against counsel unsuccessful at trial would likely have a severe and negative impact on the functioning of the criminal justice system." *Glaze v. Larsen*, 207 Ariz. 26, 32, 83 P.3d 26, 32 (2004). The same is true for the Seventh Circuit's rule of accrual.

6. Dangers of the Seventh Circuit's Rule

The Seventh Circuit's accrual rule violates the principle that a civil action should not be permitted to collaterally attack a criminal conviction. This Court recognized in *Heck* "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. By limiting opportunities for collateral attack, the Court has sought to "prevent[] inconsistent decisions, [thus] encourag[ing] reliance on adjudication." *Oregon v. Guzek*, 126 S.Ct. 1226, 1233 (2006) (quoting *Allen*

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actual innocence); New York: *Britt v. Legal Aid Soc., Inc.*, 95 N.Y.2d 443, 447, 718 N.Y.S. 2d 264, 267 (2000); Oregon: *Stevens v. Bispham*, 316 Or. 221, 238, 851 P.2d 556, 566 (1993); Tennessee: *Gibson v. Trant*, 58 S.W.3d 103, 110 (Tenn. 2001); Texas: *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995); Virginia: *Adkins v. Dixon*, 253 Va. 275, 282, 482 S.E.2d 797, 801 (1997); Washington: *Owens v. Harrison*, 120 Wash.App. 909, 913, 86 P.3d 1266, 1268 (2004); Wisconsin: *Hicks v. Nunnery*, 253 Wis.2d 721, 754, 643 N.W.2d 809, 823 (Wis.App. 2002).

v. McCurry, 449 U.S. 90, 94 (1980)).

The rule adopted by the Seventh Circuit, if allowed to stand, will result in the needless filing of innumerable false arrest claims, filings necessary to preserve the claims in the event that a conviction is eventually overturned. As Judge Guy noted in his dissenting opinion in *McCune v. City of Grand Rapids*, 842 F.2d 903, 909 (6th Cir. 1988), if these claims are stayed pending the outcome of criminal proceedings, they will clutter the district court's docket with inactive cases. If these claims are allowed to proceed before the criminal case has reached a final adjudication, there is the potential for inconsistent civil and criminal results, the very evil that the Court identified and attempted to avoid in *Heck*. 512 U.S. at 486.

CONCLUSION

"[T]hose who have been damaged by official action infringing on rights guaranteed them by the Constitution should have an avenue for redress of that damage." *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J, dissenting from denial of stay). The rule of accrual adopted by the Seventh Circuit denies a remedy for an unconstitutional conviction and imprisonment to a person who, like petitioner, was incarcerated for eight years because police officers exploited an unlawful arrest to secure a false confession.

The Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, the cause of action arising from the unlawful arrest

does not accrue until the criminal charges have been resolved in favor of the arrestee.

Respectfully submitted.

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